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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]1970

R. R., *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal From The Court of Civil Appeals
For The Fourth Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATE STATUTE INVOLVED	2
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4
ARGUMENT	4
The General Purpose Of Juvenile Laws Is Broad.	4
The Texas Statute Presents No Denial Of Due Process Or Equal Protection	6
The Texas Statute Does Not Violate The Prohibition Against Cruel And Unusual Punishment.	9
The Case Presents No Substantial Federal Question.	11
CONCLUSION AND PRAYER	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases:	Page
Abernathy v. United States, 418 F.2d 288 (5th Cir., 1969)	8
Carter v. United States, 306 F.2d 283 (D.C. Cir., 1962)	7
Cunningham v. United States, 256 F.2d 467 (5th Cir., 1958)	7, 9
David v. State, 453 S.W.2d 172 (Tex.Crim., 1970)	10
Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944)	13
Eller v. United States, 327 F.2d 639 (9th Cir., 1964)	7
E.S.G. v. State, 447 S.W.2d 225 (Tex.Civ. App.—San Antonio, 1969, error ref., n.r.e.)	14
E.S.G. v. The State of Texas, No. 1471, October Term, 1969 (June 15, 1970)	14
Foston v. United States, 389F.2d 86 (8th Cir., 1968), certiorari denied, 392 U.S. 440, 88 S.Ct. 2319, 20 L.Ed.2d 1401 (1968)	7
Gallego v. United States, 276 F.2d 914 (9th Cir., 1960)	10
In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)	5, 6
Ginsberg v. State of New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)	5, 12
Henderson v. Dutton, 397 F.2d 375 (5th Cir., 1968)	9
In re Herrera, 143 P.2d 345 (Cal.Sup.Ct., 1943)	7
Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944)	8
McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 393 (1961)	8

TABLE OF AUTHORITIES (Continued)

Cases:	Page
Overstreet v. United States, 367 F.2d 83 (5th Cir., 1966)	9
People v. Deibert, 256 P.2d 355 (Cal.App. 2d, 1953)	5
People v. Hinkley, 199 N.Y.S. 101 (Sup.Ct., Monroe Co., 1923)	4
People ex rel Meltsner v. Follette, 302 N.Y.S.2d 624 (App.Div.2d 1969)	7
In re Perham, 184 A.2d 449, 100 A.L.R.2d 1238 (N.H.Sup.Ct., 1932)	5
Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944)	5, 12
Rogers v. United States, 326 F.2d 56 (10th Cir., 1963)	7
In re Santillanes, 138 P.2d 503 (N.M. Sup.Ct., 1943)	5, 7
Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)	8
Smith v. State, 444 S.W.2d 941 (Tex.Civ.App.—San Antonio, 1969, error ref., n.r.e.)	14
State v. Buckner, 254 S.W. 179 (Mo.Sup.Ct., 1923)	4
State v. Meyer, 37 N.W.2d 3 (Minn.Sup.Ct., 1949)	7
Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910)	10
Wheeler v. Shoemake, 57 So.2d 267 (Miss.Sup.Ct., 1952)	7
In re Winship, — U.S. —, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	5, 6
Young v. Knight, 329 S.W.2d 195, 77 A.L.R.2d 994 (Ky.Ct.App., 1959)	5

TABLE OF AUTHORITIES (Continued)

Statutes:	Page
28 U.S.C.A., Section 1257(2)	2
Article 2338-1, Texas Civil Statutes (Vernon, 1948)	2, 12, 13, 14
Section 1	12
Section 2	12
Section 3	14
Section 13	2, 4, 10, 11
Section 14	10
Article 5143d, Texas Civil Statutes (Vernon, 1948)	11, 12
Section 1	12
Section 2	12
Section 12	11
Section 13	11
Section 17	11
Article 1350, Texas Penal Code (Vernon, 1948)	6
Treatises:	
21 Am.Jur.2d 560-566, Criminal Law, Sections 611-615	9
17 Am.Jur.2d 993-995, Juvenile Courts and Delinquent And Dependent Children, Sections 13-15	12

NO. 1574

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

R. R., *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal From The Court of Civil Appeals
For The Fourth Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

The Appellee State of Texas respectfully moves the Court to dismiss the appeal in this cause on the ground that the appeal does not present a substantial federal question and further moves the Court, in the alternative, to affirm the judgment sought to be reviewed on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion below will be officially reported as *R.R. v. the State of Texas*, — S.W.2d — (Tex.Civ.App. - San Antonio, 1969, error ref., n.r.e.), and is included in the appendix to the Jurisdictional Statement of Appellant at pages 19-22.

JURISDICTION

The Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C.A., Section 1257(2).

STATE STATUTE INVOLVED

This appeal raises the question of the constitutionality of Article 2338-1, Section 13(c)(2), Texas Civil Statutes (Vernon, 1948) (Acts 1943, 48th Leg., p. 313, ch. 204, as amended by Acts 1965, 59th Leg., p. 1256, ch. 577, sec. 5, and Acts 1967, 60th Leg., p. 1082, ch. 475, sec. 6). The entire Article 2338-1 is set out in the appendix to the Jurisdictional Statement at pages 40-63. Section 13 reads as follows:

> "(a) The judge may conduct the hearing of any case in an informal manner and may adjourn the hearing from time to time. In the hearing the general public may be excluded. All cases involving children shall be heard separately from the trial of cases against adults.
>
> "(b) If no jury is demanded, the judge shall proceed with the hearing. No jury may be allowed in the hearing provided in Section 6 of this Act. When the proceeding is with a jury, the verdict shall state whether the child is a 'delinquent child' within the meaning of this Act.
>
> "(c) If the judge or jury finds that the child is delinquent, or otherwise within the provisions of this Act, the court may by order duly entered proceed as follows:
>
> "(1) place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court shall determine;
>
> "(2) commit the child to a suitable public institution or agency or to a suitable private in-

stitution or agency authorized to care for children; or place the child in a suitable family home or parental home for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one years;

"(3) make such further disposition as the court may deem to be for the best interest of the child, except as herein otherwise provided.

"(d) No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudiciation, nor shall such adjudiciation be deemed a conviction, nor shall any child be charged with or convicted of any crime except perjury in any court except as provided in Section 6 of this Act.

"(e) The disposition of the child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any court other than the juvenile court, nor shall such disposition or evidence operate to disqualify a child in any further civil service examination, appointment or application. However, nothing in this subsection prevents a showing before the district court or the grand jury that the child has been transferred for criminal proceedings under Section 6 of this Act.

"(f) Whenever the court commits a child to any institution or agency, it shall transmit with the order of commitment a summary of its information concerning such child and give in the order of commitment the birth date of the child or attach thereto a certified copy of the birth certificate."

QUESTION PRESENTED

Appellant raises the question of whether Section 13 (c) (2) of Article 2338-1 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the prohibition against cruel and unusual punishment in the Eighth Amendment because the statute authorizes the confinement of a juvenile for a longer period of time than an adult would serve for committing the same offense as the juvenile.

STATEMENT OF THE CASE

Appellee State of Texas is in general agreement with the history of the case set forth in paragraphs (i) and (ii) under Jurisdiction on pages 2 and 3 of the Jurisdictional Statement. The issue of constitutionality was raised by Appellant for the first time in the Court of Civil Appeals below and was rejected.

ARGUMENT

The General Purpose Of Juvenile Laws Is Broad.

The general purpose of laws relating to juveniles should be considered whenever the terms of such statutes are being interpreted. The juvenile laws have traditionally aimed at prevention and correction of undesirable development or behavior of a child rather than mere punishment. For this reason the laws pertaining to juveniles have been regarded as civil rather than criminal. The statutes have been designed to promote the welfare of children, to prevent delinquency, and to reform delinquent children. *People v. Hinkley,* 199 N.Y.S. 101 (Sup.Ct., Monroe Co., 1923); *State v. Buckner,* 254 S.W. 179 (Mo.Sup.Ct., 1923);

People v. Deibert, 256 P.2d 355 (Cal.App.2d, 1953). Thus the laws are protective in nature to give a youth a chance to become a worthy citizen. *In re Perham,* 184 A.2d 449, 100 A.L.R.2d 1238 (N.H.Sup.Ct., 1962). The juvenile proceedings are designed to check a criminal tendency in its inception. *Young v. Knight,* 329 S.W.2d 195, 77 A.L.R.2d 994 (Ky.Ct.App., 1959).

The courts have recognized that the state has a greater duty toward children than for adults. See, e.g., *In re Santillanes,* 138 P.2d 503 (N.M.Sup.Ct., 1943). This Court ruled in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), that the state has the authority to protect the welfare of children and made the following comment:

> "The state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies . . ." (321 U.S. 158, 168, 64 S.Ct. 438, 443).

This rule was followed in *Ginsberg v. State of New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), a case involving an obscenity law protecting minors and having a question of free speech and press. The following comment was made:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate . . ." (390 U.S. 629, 638, 88 S.Ct. 1274, 1280).

Nothing in the decisions of *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), or *In re Winship,* — U.S. —, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), abridged the right of the state to act for the welfare of minors. Both *Gault* and *Winship* were concerned

with the constitutional rights of the minor at the adjudacatory stage at which the determination of delinquency was made. The constitutionality of the juvenile laws was not in issue. The *Gault* case actually involved a commitment at least partly based on an act by the minor which carried a punishment of only two months for adults but which resulted in potential confinement up to six years for the minor, but the Court made no comment on the period of confinement or the statute authorizing confinement until the minor reached age 21. The Court in the *Winship* decision recognized that:

> ". . . It is true, of course, that the juvenile may be engaging in a general course of conduct inimical to his welfare which calls for judicial intervention . . ." (90 S.Ct. 1068, 1074).

Neither *Gault* nor *Winship* afforded Appellant the relief sought in this proceeding.

The Texas Statute Presents No Denial Of Due Process Or Equal Protection.

Appellant urges that the two constitutional guarantees of due process and equal protection of the laws have been violated because he has been declared delinquent and committed to the Texas Youth Council for an indeterminate period not to exceed his twenty-first birthday, a period of time in excess of the sentence which would have been received by an adult who was convicted of the same offense committed by Appellant in violation of Article 1350, Texas Penal Code (Vernon, 1948) (statute set forth on pages 5 and 6 of the Jurisdictional Statement). This view cannot be substantiated.

Laws pertaining to juveniles and youthful offenders have been attacked in various courts on the ground that the statutes contravene due process and equal protection of the laws, but the statutes have been upheld. The courts have recognized the broad power of the state to act for the welfare of minors. The juvenile and youthful offender laws have been justified as benefitting the youth by providing special treatment for rehabilitation, even when the youths may face potentially longer confinement than adults who commit the same acts. The use of age brackets has been found to be a reasonable classification because of the general purpose of juvenile laws. *In re Santillanes,* supra; *In re Herrera,* 143 P.2d 345 (Cal. Sup.Ct., 1943); *State v. Meyer,* 37 N.W.2d 3 (Minn. Sup.Ct., 1949); *Wheeler v. Shoemake,* 57 So.2d 267 (Miss.Sup.Ct., 1952); *People ex rel. Meltsner v. Follette,* 302 N.Y.S.2d 624 (App.Div.2d, 1969).

The federal courts have clearly seen the need for using different standards for youthful offenders than for adults and for providing special treatment. The Federal Youth Corrections Act has been designed to give preventative guidance and training and correctional treatment for rehabilitation of youths rather than punishment and has been upheld repeatedly against due process and equal protection claims. Due to the special rehabilitative purpose of the statute, the courts have approved confinement under the act longer than that imposed by the statutes setting forth the particular offenses involved. *Cunningham v. United States,* 256 F.2d 467 (5th Cir., 1958); *Carter v. United States,* 306 F.2d 283 (D.C.Cir., 1962); *Rogers v. United States,* 326 F.2d 56 (10th Cir., 1963); *Eller v. United States,* 327 F.2d 639 (9th Cir., 1964); *Foston v. United*

States, 389 F.2d 86 (8th Cir., 1968), certiorari denied, 392 U.S. 440, 88 S.Ct. 2319, 20 L.Ed.2d 1401 (1968); *Abernathy v. United States,* 418 F.2d 288 (5th Cir., 1969).

In general equal protection problems have been approached in two ways. In some cases, such as those involving economic regulation, the courts have exercised a "permissive review" and upheld the statutes involved if any state of facts reasonably justifies the law because the legislatures have wide latitude in making laws affecting some groups differently than others. Thus a classification should be upheld unless highly arbitrary and wholly irrelevant to the objective of the law. *McGowan v. State of Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Under the second approach, however, the courts make a "strict review" of laws involving suspect classifications, such as race, and serious infringement of fundamental personal liberties and require a high degree of justification. *Skinner v. State of Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). Even in this class of cases, though, the states in exercising the police power do not have to ignore experience marking a class of offenders or a type of offenses for special treatment. *Skinner v. State of Oklahoma,* supra.

Whichever standard is applied to the equal protection question before this Court, the Texas law is valid. A classification based on age or susceptibility to rehabilitation is reasonable and not suspect, as indicated by the cases cited previously. The Texas legislature has the discretion to recognize, as have other state legislatures and the United States Con-

gress, that youthful offenders should be accorded an opportunity for rehabilitation before patterns of criminal behavior become too ingrained to break. A law subjecting the juvenile to longer confinement or supervision than an adult might receive is within the broad authority of the state to act for the welfare of minors. The statute here in question is applied equally to all juveniles and is clearly not in violation of due process or equal protection of the laws and should be upheld.

The Texas Statute Does Not Violate The Prohibition Against Cruel and Unusual Punishment.

Appellant has contended that the mere fact that a juvenile offender can be subjected to confinement or supervision potentially longer than an adult would be for the same basic offense is cruel and unusual punishment in violation of the Eighth Amendment. This view has been expressly rejected. *Cunningham v. United States,* supra. The cases cited in the preceding section have found the juvenile laws to be reasonable exercises of the authority of the state to provide for the welfare of children, and that finding precludes any argument that the statute in question here establishes a cruel and unusual punishment.

In general the cruel and unusual punishment prohibition is aimed at the type of punishment rather than the duration of sentence and thus affects inhuman and barbarous practices. See 21 Am.Jur.2d 560-566, Criminal Law, Sections 611-615. Since establishing the length of sentences is within the province of the legislature, the general rule is that a sentence within the limits prescribed by law is not cruel and unusual. *Overstreet v. United States,* 367 F.2d 83 (5th Cir., 1966); *Henderson v. Dutton,* 397 F.2d 375 (5th Cir.,

1968); *David v. State,* 453 S.W.2d 172 (Tex.Crim., 1970). A sentence may be excessively disproportionate to the offense, however, and possibly constitute cruel and unusual punishment. *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). The *Weems* case cited by Appellant had cruel and unusual aspects other than the length of sentence. The Ninth Circuit has upheld a statute prohibiting a suspended sentence or parole for narcotics offenders against a claim of cruel and unusual punishment, with the court in effect approving longer incarceration for narcotics offenders than would be received by persons receiving equal sentences for offenses for which parole is not prohibited. *Gallego v. United States,* 276 F.2d 914 (9th Cir., 1960).

The Texas statutes involve no cruel or unusual features. Article 2338-1, Sections 13(d) and 13(e), actually protects the minor from civil disabilities imposed on convicted adults. While Appellant has stressed the maximum length of custody, the juvenile laws clearly provide that a youngster can be released on parole or given a discharge prior to age twenty-one and thus may spend only a short time under state control. In addition a minor committed under the juvenile laws for a major crime, such as murder, may receive far shorter confinement than he would receive as an adult.

Various provisions of the Texas statutes concern the disposition of delinquent children. Article 2338-1, Section 13 (cited in this brief and pages 53-55 of the Jurisdictional Statement), empowers the juvenile court to act for the best interests of the child. Article 2338-1, Section 14 (found in the Jurisdictional Statement, pages 58-59), allows modification of judgment.

For those youngsters committed to the Texas Youth Council under the authority of Article 2338-1, Section 13, and the Texas Youth Council Act, Article 5143d, Sections 12 and 13, Texas Civil Statutes (Vernon, 1948), the Youth Council has broad authority to act under Section 17 of Article 5143d as follows:

> "When a child has been committed to the Youth Council as a delinquent child, the Council may:
>
> "(a) Permit him his liberty under supervision and upon such conditions it believes conducive to acceptable behavior; or
>
> "(b) Order his confinement under such conditions as it believes best designed for his welfare and the interests of the public; or
>
> "(c) Order reconfinement or renewed release as often as conditions indicate to be desirable; or
>
> "(d) Revoke or modify any order of the Council affecting a child, except an order of final discharge, as often as conditions indicate to be desirable; or
>
> "(e) Discharge him from control when it is satisfied that such discharge will best serve his welfare and the protection of the public."

The statutes clearly allow flexibility and are designed to promote the welfare of minors. These statutes serve a legitimate purpose and cannot be said to constitute cruel and unusual punishment.

The Case Presents No Substantial Federal Question.

The questions raised on this appeal have been raised in various courts and are not of first impression. Laws relating to minors have been upheld against a variety of constitutional attacks. See the cases cited previously

and 47 Am.Jur.2d 993-995, Juvenile Courts and Delinquent and Dependent Children, Section 13-15.

The Appellee State of Texas has recognized the need to provide guidance and rehabilitative treatment for youths. The state has exercised the broad duty mentioned in the *Prince* and *Ginsberg* cases to promote the welfare of children by establishing the juvenile court system in Article 2338-1. The purpose of the statute is found in Section 1, as follows:

> "The purpose of this Act is to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interest of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given him by his parents."

This purpose is amplified by the act creating the Texas Youth Council, Article 5143d, as set out in Section 1:

> "The purpose of this Act is to create a Texas Youth Council to administer the state's correctional facilities for delinquent children, to provide a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged delinquent by the courts of this state and committed to the Texas Youth Council, and to provide active parole supervision of such delinquent children until officially discharged from custody of the Texas Youth Council. . . ."

In Section 2 of each of the aforementioned statutes, the legislature expressly directed that the statutes be liberally construed to accomplish the purpose indicated. The Texas courts have recognized the need for the

special juvenile laws, and the constitutionality of Article 2338-1 has been upheld. *Dendy v. Wilson,* 142 Tex. 460, 179 S.W.2d 269 (1944). The great need for the protection and rehabilitation of juvenile delinquents justfies the exercise of the broad authority of the state in the manner questioned on this appeal.

The authority of the state as applied in Appellant's particular case is proper and not an abuse of due process or equal protection or a cruel or unusual punishment. A review of the Statement of Facts (hereafter abbreviated S.F.) from Appellant's trial reveals a sequence of events more serious than the breaking of a car window worth $7.88 on February 26, 1969. For no apparent reason, Appellant cursed high school R.O.T.C. students patrolling a parking lot and struck one student in the mouth and kicked another one. Appellant then twice threw a rock at a car window and ran off. When a student gave chase, Appellant threatened the student with a rock (S.F. 10-12, 17-18, 23-26). The judge found Appellant to be delinquent beyond a reasonable doubt (S.F., 34). After finding Appellant to be delinquent, the judge reviewed the minor's case history in order to make a proper disposition of the youngster and noted that Appellant had not been cooperative with juvenile authorities and that he had been referred to juvenile authorities at times from November, 1968, to March, 1969, for burglary (twice), auto theft, and drunkeness and had been suspended from school shortly before the rock-throwing incident because of difficulties with a teacher (S.F., 36-38). While only the events surrounding the breaking of the car window were proved as the basis for adjudging Appellant delinquent, the other factors added clear support for the order committing Appel-

lant to the Texas Youth Council for an indeterminate period not beyond Appellant's twenty-first birthday.

The cases cited in this motion clearly refute the contentions raised by Appellant. The due process and equal protection questions have previously been decided in Appellee's favor in *Smith v. State,* 444 S.W.2d 941 (Tex.Civ.App.-San Antonio, 1969, error ref., n.r.e.) (See Jurisdictional Statement, pages 23-34). In addition this Court very recently refused to review a vagueness challenge to the definition of a delinquent child in Article 2338-1, Section 3. The Court dismissed the appeal for want of jurisdiction and denied the writ of certiorari in *E.S.G. v. The State of Texas,* No. 1471, October Term, 1969 (June 15, 1970), which was an appeal from *E.S.G. v. State,* 447 S.W.2d 225 (Tex.Civ.App.-San Antonio, 1969, error ref., n.r.e.). In denying review this Court in effect recognized the broad power of the state to promote the welfare of children. Appellee urges the Court also to uphold the sections of Article 2338-1 brought forth on this appeal, because the statute on its face and as applied is clearly constitutional.

CONCLUSION AND PRAYER

Appellee respectfully submits that the Jurisdictional Statement of Appellant presents no substantial federal question and that the authorities cited by Appellee manifestly show that the questions raised are so unsubstantial as not to require further argument.

Appellee therefore respectfully moves the Court to dismiss this appeal or in the alternative to affirm the judgment entered in this cause by the Court of

Civil Appeals for the Fourth Supreme Judicial District.

Respectfully submitted,

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CETRIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General, certify that copies of Appellee's Motion to Dismiss or Affirm have been served on the attorney for Appellant by depositing the copies in the United States Mail, postage prepaid, certified mail, on this ____ day of June, 1970, addressed to Frank P. Christian, Attorney at Law, Bexar County Legal Aid Association, 203 West Nueva Street, San Antonio, Texas 78207.

ROBERT C. FLOWERS
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